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No. 700.

Supreme Court of the United States

OCTOBER TERM, 1943.

NORMAN G. BAKER, PETITIONER,

VS.

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

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REPLY BRIEF OF PETITIONER.

Since filing Petitioner's brief in this case, the opinion has been published in *Baker* v. *United States*, (C. C. A. 8) 139 F. 2d, Advance Sheets, page 721. In that case the Court held that Section 709a of Title 18 of the United States Code, had not been repealed by Rule V, but is still the law, but the Court denied the motion to correct the mandate on the ground that the record "does not show that Baker was committed to jail 'to await transportation to the place at which his sentence was to be served.'"

No evidence was introduced on the hearing of the motion.

In the case at bar, it is specifically alleged by the petition in the lower court that the United States Marshal served the commitment in question "by delivering this Petitioner to the Pulaski County Jail at Little Rock, Arkansas, on January 25, 1940, to await transportation to the penitentiary at Leavenworth (Par. 4); that Petitioner commenced the service of his sentence on January 25, 1940, when he was placed in the county jail "to await transportation to the penitentiary at Leavenworth, and service of said sentence continued in said jail and in a jail at Pine Bluff, Arkansas, to and including March 22, 1931 (Par. 5), on which date he was delivered to the Respondent at the federal penitentiary at Leavenworth, Kansas" (Tr. of Rec. p. 6).

There was no denial of the allegations of the petition and these allegations of fact were admitted by the demurrer (Tr. of Rec. p. 17), so no evidence was necessary to establish these facts.

Counsel for Respondent correctly state that Petitioner's right to be released at the present time depends on whether he is entitled to credit for the time he spent in the County Jail from January 25, 1940, when he filed his notice of appeal, to March 15, 1941, when the mandate of the Circuit Court of Appeals was filed in the District Court.

Counsel contend that the filing of Petitioner's notice of appeal resulted in an automatic stay of the execution of his sentence, because Rule V provides that "an appeal from a judgment of conviction stays the execution of the judgment." Counsel say that "Rule V is merely a regulation of the terms and conditions of appeals in criminal cases"; also that the power to stay enforcement of the judgment pending appeal has always been considered part

of an appellate court's traditional equipment for the administration of justice (p. 7).

Counsel overlook that neither the District Court nor the 10th C. C. A. did anything to exercise that traditional power. It is conceded that execution of the judgment was commenced by putting Petitioner in the County Jail on January 25th to await transportation to the penitentiary.

The Court did not recall the commitment.

The Court did not direct the marshal to suspend execution of the commitment.

The Court made no order and issued no commitment to detain Petitioner in the County Jail.

It is not a case where the Court exercised any power to supersede the judgment. The Court did nothing but leave Petitioner in the control of the marshal under the original commitment. It took no action whatever to change Petitioner's status as a prisoner undergoing service of sentence in the County Jail to await transportation to the penitentiary.

Substantive Law.

Counsel for Respondent ignored the vital question of whether Section 709a of Title 18 of the United States Code embraces a matter of substantive law.

Unquestionably the right to liberty is a substantive right.

Unquestionably the right to deprive a person of liberty by imprisonment after conviction for a crime is a substantive matter.

Unquestionably the punishment to be inflicted for a given crime is a substantive matter.

Unquestionably statutory provisions as to what shall constitute the commencement and the end of service of a sentence are likewise matters of substantive law.

As Section 709a of Title 18 specifies particular facts which shall constitute the commencement of service of a sentence, it is necessarily substantive.

So if Rule V repeals 709a or modifies it, Rule V must necessarily be held a matter of substantive law, for any law which repeals or modifies a substantive law must be equally substantive.

Unquestionably there can be no justice in imprisoning a man five years and two months on a four year sentence.

Unquestionably the Constitution forbids double jeopardy, and the whole spirit of American law is against double punishment.

And what is imprisonment, but punishment?

Unquestionably it was the intent of Congress in enacting Section 709a to prevent such double punishment by a substantive law.

Counsel for Respondent refer in argument (p. 9) to Rules 72 and 73 of the Rules of Civil Procedure and state:

> "There can be no question, therefore, that the grant of authority to this Court under the Act of February 24, 1933 (18 U. S. C. 688), to prescribe by rule the conditions on which supersedeas may be allowed involves no unconstitutional delegation of legislative power."

But Counsel fail to note that Rules 72 and 73 apply only when an appeal "is permitted by law," and only "whenever an appellant entitled thereto, desires a stay on appeal." These rules do not purport to "*entitle*" appellant to a stay and throw no light upon whether Section 709a is a matter of substantive law. Furthermore, Title 28, United States Code, Sections 723b and 723c specifically provide that "said rules shall neither abridge, enlarge nor modify the substantive right of any litigant," thus clearly

showing the congressional intent to preclude the Supreme Court from legislating on substantive rights.

Counsel quote (p. 9) from *Bank of the United States v. Halstead*, 10 Wheat. 51-60, that power is vested in the courts to regulate the practice of the courts, but fail to quote the portions of the opinion holding that Congress had a right to regulate proceedings on executions:

> "The right of Congress, therefore, to regulate the proceedings on executions, and direct the mode, and manner, and out of what property of the debtor satisfaction may be obtained, is not to be questioned, * * *" (p. 54).

The court then quoted the specific provisions giving the courts power to issue writs "necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law" (p. 55) and it was said further:

> "It was well known to Congress, that there were in use in the state courts, writs of execution, other than such as were conformable to the usages of the common law. And it is reasonable to conclude that such were intended to be included under the general description of writs agreeable to the principles and usages of law. * * * That it was intended to restrict the power to common law writs of execution sanctioned by the principles and usages of the state laws, is strongly corroborated by the circumstance that the process act, passed a few days thereafter, adopts such as the only writs of execution to be used, * * *" (p. 56).

The court said further:

> "That act, therefore, adopts the effect as well as the form of the state processes" (p. 57);

so that the effect of the writs was determined by Congress itself and not left to legislation by the court.

In *Tinkoff* v. *U. S.*, 86 F. 2d 868, cited by counsel (p. 8), the question in the case at bar did not arise. In that case it was held that supersedeas was a matter of statutory right if the appeal was taken and bond given within sixty days and that the statute fixed the time in which an appeal must be taken if a supersedeas was to be allowed by effect of law or by the court.

In *Steinberg* v. *Cummings*, 14 F. Supp. 647, it was held that the prisoner was not entitled to credit for time spent in detention headquarters because such detention was by order of court made upon his own application. That case does not involve the effect of Section 709a at all.

Counsel argue that Petitioner's failure to elect to serve his sentence in the penitentiary should be given the same effect as a voluntary application for confinement in the county jail instead of in the penitentiary. This suggestion ignores the fact that Petitioner persistently insisted upon his right to be admitted to bail, making five different applications for that purpose, and that his right to release on bail would have been defeated by an election to serve in the penitentiary.[1]

Surely Petitioner is not to be punished because of his persistence in his efforts to obtain release upon bail.

In conclusion, we urge that there is nothing in Rule V which authorizes the marshal to keep a prisoner in confinement pending appeal. The only authority the marshal had to hold Petitioner was the commitment to the penitentiary which the marshal served by putting Petitioner in the county jail to await transportation to the penitentiary.

Under Section 709a of Title 18, Fed. Code Ann., such imprisonment to await transportation, constituted service

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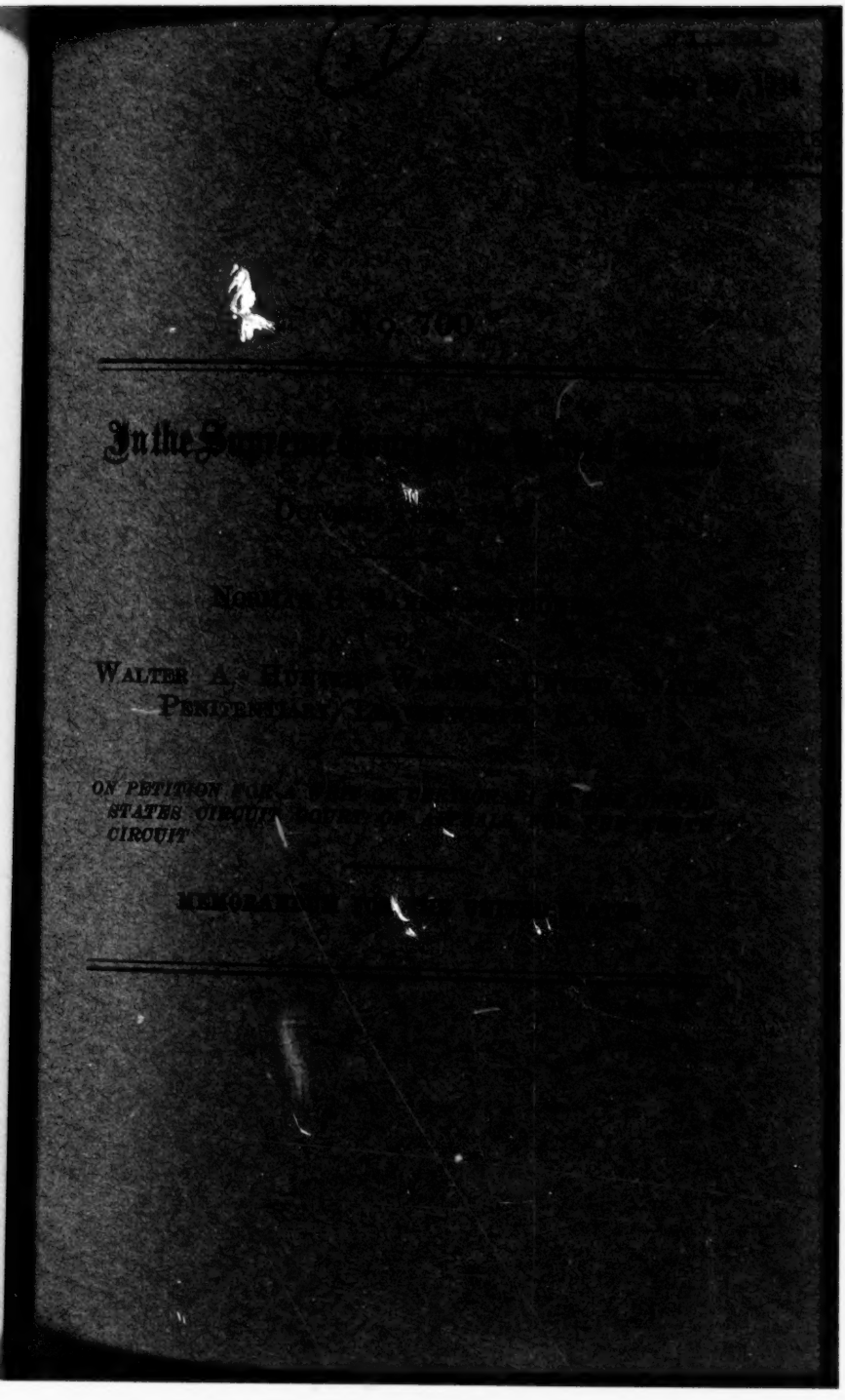
[1]*Holmes* v. *U. S.*, 125 F. 2d 432.

of Petitioner's sentence and having served more than four full years, he is now entitled to release.

Respectfully submitted,

A. G. BUSH,

Counsel for Petitioner.



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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Since our brief in opposition to the petition for a writ of certiorari was filed in the above-entitled case, our attention has been called to the decision of the Circuit Court of Appeals for the Eighth Circuit in *Baker* v. *United States,* decided January 8, 1944, reported at 139 F. (2d) 721 (February 28, 1944, issue of the advance sheets). In that decision the circuit court of appeals, which had affirmed petitioner's judgment of conviction (115 F. (2d) 533; see our brief in opposition, p. 4), denied petitioner's application to modify the mandate of that court. In his application petitioner apparently made the same contentions with respect

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to the validity of Rule V of the Criminal Appeals Rules as he makes in his petition for a writ of certiorari before judgment in the Circuit Court of Appeals for the Tenth Circuit filed February 15, 1944. The Circuit Court of Appeals for the Eighth Circuit held that there was no merit in petitioner's contentions.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

MARCH 1944.

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